IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 25TH JANUARY 2007 / 5TH MAGHA 1928

WP(C).No. 2985 of 2007(E)

O.S.1589/94 OF SUB COURT, THRISSUR

PETITIONER:

MUHAMMEDUNNI, S/O.THERUVATH VEETTIL
KUNHIMOIDU, AGED 66 YEARS, PAVARATTY AMSOM,
MARUTHAYOOR DESOM, CHAVAKKAD TALUK,
THRISSUR DISTRICT.

BY ADV. SRI.K.RAMACHANDRAN

RESPONDENTS:
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1. HASSAN, S/O.KARUVATH ABDU HAJI,
RESIDING AT VETTATHU AMSOM DESOM,
PERINTALMANNA TALUK, MALAPPURAM DISTRICT.

2. ABUNNY (ABOOBACKER),
S/O.THERUVATH VEETTIL PATTATH BAVA,
RESIDING AT PAVARATTY AMSOM, MARUTHAYOOR DESOM,
CHAVAKKAD TALUK, THRISSUR DISTRICT.

BY //

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 25/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO.2985 OF 2007

Dated 25th January 2007

J U D G M E N T

First respondent filed a suit for specific performance of an agreement for sale. Suit was decreed. When execution proceedings were initiated petitioner, who is not a party to the suit raising a contention that he has kudikidappu right over 10 cents of property. Petitioner filed I.A.2805/06 under Rule 97 of Order XXI of Code of Civil Procedure before Sub court, Thrissur. When the application was dismissed, petitioner approached this court by filing E.F.A.32/06. A Division Bench of this court finding that case of petitioner is that decree schedule property includes 10 cents of kudikidappu claimed by petitioner, directed the executing court to appoint a commission and direct the commissioner, with the assistance of Taluk Surveyor or any other surveyor, to measure and identify the kudikidappu and order delivery of property only after a report is submitted by commissioner after proper identification.

Commissioner submitted a report whereunder commissioner identified 10 cents claimed by petitioner, not within the property to be delivered but far away. Aggrieved by the report, petitioner filed I.A.220/07, an application to set aside the report. Learned Sub Judge dismissed the application. Consequently, as per order dated 19/1/2007 learned Sub Judge directed delivery of property with police aid on 31/1/2007. This petition is filed under Article 227 of Constitution of India to quash the orders contending that commissioner did not properly identify ten cents of property and first respondent is not entitled to get delivery of 10 cents belonging to him.

2. Learned counsel appearing for petitioner and first respondent were heard.

3. On hearing learned counsel appearing for petitioner and first respondent, it is clear that petition under Article 227 of Constitution of India will not lie. Even though, an order dismissing an application under Order XXVI Rule 10 of Code of Civil procedure, can be challenged by recourse to Article 227 of Constitution of India, when pursuant to that order delivery of the property was ordered dismissing his application under Rule 97 of Order XXI, remedy of petitioner is to

challenge that order by an appeal, as he has done earlier by filing E.F.A.32/06. In such circumstance, this petition is dismissed, with liberty to petitioner to challenge the order by an execution first appeal.

4. Learned counsel appearing for petitioner then submitted that before getting an opportunity to file an appeal, first respondent may not be permitted to take delivery of the property and stay may be granted for a short period so that, petitioner can prefer an appeal. Order dated 19/1/2007 shows that delivery is to be effected only on 31/1/2007. In such circumstance, petitioner is having sufficient time to prefer an appeal and to get appropriate order. Petition disposed accordingly.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.